IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 407

STEPHEN A. SULENTICH,

Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY.

The Importance of Certiorari Here.

Respondent overlooks the real issue. It is whether, in a master and servant action under the Federal Employers' Liability Act or the Jones Act, an employer can by contract determine the status of the employee, and in the event of injury allege that the servant was not an "employee" because of allegedly frauduient misrepresentations made after he had entered upon his master's work. It likewise overlooks the issue as to whether or not the alleged fraud must be causally related to the injury.

Minneapolis Etc. R. Co. v. *Borum*, 286 U. S. 447, does not enunciate the proposition for which Respondent contends. On the contrary, this Court said at p. 449 of that decision:

> "*Neither his age nor his physical condition contributed to cause his injury.*" (Italics ours)

This case involves not only Sulentich. It concerns every injured servant seeking a remedy under two important federal statutes, the Federal Employers' Liability Act and the Jones Act. It is this type of case which today constitutes much of the litigation on the law side of the civil docket in both federal and state courts.

But there is more. There is that encroachment upon the function of the jury so classically demonstrated when a court states that it can with propriety direct a verdict on certain charges of negligence, albeit they are supported by evidence, and that the holdings of this court concerning the function of court and jury not only refer to situations wherein a verdict is directed on all charges.

Respondent does not meet the obvious conflict between the opinion in this case, the decisions of other Courts of Appeals and this Court.

It cannot be denied that:

a. This opinion is contrary to *Payne* v. *Dougherty*, 283 F. 383 (1922) which, in accord with the vast number of cases in 136 ALR 1125, state the test of the defense of fraud in obtaining employment is whether there is a causal connection between the injury and the misrepresentation. It is at loggerheads with *Casso* v. *Penn. R. Co.*, 219 F.2d 303 (1955), which specifically points out there can be no defense of fraud committed after the relationship had been entered into, and *Sea Shipping Co.* v. *Sieracki*, 328

U.S. 85, 90, 97 (1946), which determined that the servant's status is decided solely by the work he does and not by any contract.

b. No court has ever held that fraud allegedly committed subsequent to the relationship of master and servant has ever voided that relationship *ab initio*.

c. Section V of the Federal Employers' Liability Act has, amongst its principal purposes, to void contracts whereby employers seek to water away rights of employees under the Federal Employers' Liability Act and the Jones Act.

It serves no useful purpose for Respondent to indulge in a criticism of these decisions. The fact remains that this case is in utter conflict with the decisions of this Court and those of other Courts of Appeals.

Respondent further avoids the issue when it states that Section V of the Federal Employers' Liability Act does not apply because one must be an employee to prosecute the action. The very purpose of this provision was to nullify any attempts by masters to circumvent their liability to men doing their work, and to void such an argument as this.

And the terms of the instruction complained of (R. 1846, 1847) assume that the employer could by contract lawfully impose certain terms and conditions by which the status of the servant would be determined — directly counter to Section V.

Nor is there any distortion of the opinion of the Court of Appeals which emasculates the affect of the *Rogers* and *Ferguson* cases (*Rogers* v. *Mo. P. Ry. Co.*, 352 U.S. 500; *Ferguson* v. *Moore-McCormick Lines*, 352 U.S. 550.) What justification could there be for excluding certain

issues from consideration by the jury when there was evidence to support them. The power of the courts to direct a verdict on certain charges is measured by the same test as its right to direct a verdict on all charges. The arena of judge and jury is the same on the question of whether a charge of case should be submitted to the jury.

Nor was the fact that instructions tendered by Petitioner were given mean that he is estopped from complaining about the giving of an instruction which confined recovery to certain limited charges.

There can be no question that this instruction was specifically and extensively objected to, and that the court clearly understood the objections. (R. 1696-1700.)[1]

Petitioner's objections to the instruction in question clearly meet the test laid down by this Court under Rule 51 of the Federal Rules of Civil Procedure, in *Palmer* v. *Hoffman*, 318 U.S. 109, 119.

It would have been obviously futile, after the Court's ruling on this instruction, to offer proposed instructions at variance with its ruling. Even in the 7th Circuit, the objection was sufficient to preserve the point for error without tender of a contradictory instruction. (*Wantland* v. *I. C. R. R. Co.*, 237 F.2d 921 (C.A. 7, 1956).

The Court of Appeals' statement that plaintiff made no offer of proof of other and safer methods does not reflect the record. An elaborate offer of proof was made. (A. 258-265) The Court expressly ruled that there was no objection to the form of the offer, and opposing counsel

[1] The discussion concluded by the statement by the petitioner's attorney: "All right. May the record show that we are objecting because it directs a verdict on the other charges."

concurred in this ruling.[2] The offer was proper. *Scotland County* v. *Hill*, 112 U.S. 183 (1884)

Thus, there is no justification whatsoever for failing to submit jury issues to the jury.

Significantly, respondent makes no defense whatsoever of the reasons given by the Court of Appeals for its refusal to consider the error alleged under Count II. Instead, respondent argues that the error committed under Count II in connection with post-employment fraud is academic in view of the Court's finding that petitioner sustained no injury on August 17, 1953.

The finding of no injury does not sustain the judgment under Count II. The complaint alleged, and it was undisputed, that petitioner suffered sickness and disability while a seaman on duty; was hospitalized at the direction of the Captain, and the fact of such sickness was recognized by the trial judge in his charge to the jury. Sickness as well as injury is recoverable under the maintenance and cure count. Whether petitioner fell or did not fall was of no legal significance.

Accordingly, there is no merit to Respondent's contention that the decree under Count II cannot be reviewed here. That decree embodies the same erroneous theory of law incorporated in the trial court's charge to the jury under Count I, which error of law was attacked by Petitioner in the Court of Appeals as common to both Counts.

[2] The Court to plaintiff's attorney: "No, he is not objecting to the form of your offer. . . . By Mr. McCreary, representing respondent: "That is right your Honor." By the Court: "That is right. That objection will be sustained." (A. 265)

The conclusion of the trial court that Petitioner's "employment on and after August 15, 1953, was null and void and of no effect" was plainly and directly counter to the fundamental principles governing the master and servant relationship and the express terms of the Shipowners' Liability Convention, which requires fraud to be available for a defense in maintenance and cure actions to occur "when the engagement is entered into."

Respectfully submitted,

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